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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-200718

DATE: August 17, 1981

MATTER OF: Moore Service, Inc.

DIGEST:

Where agency anticipated at least two weeks before award of refuse collection contract that there would be substantial increase in Government-furnished equipment shortly into contract period which would materially alter nature of contractor's performance to substantially reduce performance cost, requirement should have been resolicited.

Moore Service, Inc. protests the modification of a contract with A.J. Fowler Corporation based on invitation for bids (IFB) DABT51-80-B-0048 issued by the Department of the Army for refuse collection and disposal at Fort Bliss, Texas. Essentially, Moore protests that the Army should have resolicited its requirement because the modification so substantially changed the contractor's conditions of performance that the competition for the contract was undermined, and asserts that the Army in fact made award to Fowler intending to modify the contract materially.

The protest is sustained.

The IFB as amended required that firms bid on all of several sets of line items. With respect to line items 01 and 02, firms were permitted to elect between bidding to provide backyard service (Option A) and curbside collection (Option B). Backyard service required that the contractor remove refuse containers from backyards at on-base housing. The solicitation indicated that tenants would be required to move containers to the curb for collection if award were made on a curbside basis. In all, 3,582 dwellings were to be serviced. Award was to be made to the offeror submitting the lowest price for whichever option cost less.

[Protest of Contract Modification]

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Regardless of the option bid, offerors were advised that the Army expected by January 1, 1981, to replace some of the 30 gallon galvanized containers it had been using with 80-84 gallon "mobile toters" which could be wheeled to the street. In this respect, the amended IFB indicated that 1,425 mobile toters were on order and that these toters would replace the 30 gallon galvanized containers at locations which would be designated later, leaving at least 2,157 quarters without toters.

Bids were opened on July 2, 1980. Only Moore and Fowler submitted bids. Both responded to all required items. Regarding line items 01 and 02, they bid per month, per dwelling as follows:

	<u>Backyard</u>	<u>Curbside</u>
Moore	\$ 4.95	\$ 3.70
Fowler	--	3.00

However, between the time Fowler was awarded a contract based on curbside pickup (August 14) and the time performance was to start -- approximately one and one half months -- the requirement for tenants to carry trash containers to curbside was announced in the Fort Bliss "Daily Bulletin" and thus came to the attention of the post Commander. As related to the contracting officer by the Deputy Commander, the Commander did not believe that the requirement was practical because soldiers stationed at Fort Bliss frequently would be in the field and it would be difficult for their dependents to carry 30 gallon galvanized containers to the street.

In response solution to the Commander's concern, the contracting officer issued a change order on October 1, the day performance under the contract began, modifying the Fowler contract to continue backyard service until December 1, the date by which (according to the Army's revised plan) 3,582 toters were expected to be available. Thereafter, there would be curbside service with a toter available for each dwelling serviced.

Moore protests that these developments undermined the basis on which the competition had been held for two reasons. First, Fowler was directed in the modification to perform for two months essentially under Option A even though Fowler had not bid an Option A price. Second, Moore asserts that the use of toters instead of 30 gallon containers allows an employee to handle one totor for every two or more 30 gallon containers and permits containers to be dumped using an automatic lift. Moore protests that for Option B it could have saved \$2,730 per month in labor costs and used one less truck had its bid been based on the use of toters for all 3,582 dwellings rather than for only 1,425.

Further, and citing our decision in A&J Manufacturing Company, 53 Comp. Gen. 838 (1974), 74-1 CPD 240, Moore argues that the award to Fowler was improper because the Army knew before award that toters would be provided for all dwellings to be serviced, and thus in effect made award with intent to modify the terms of performance after award. In the cited case we observed that a contracting officer may not make award with the intention to change equipment specifications later.

Initially, we point out that a protest concerning a contract modification ordinarily is not for resolution under our bid protest function since it involves contract administration, a matter within the authority of the contracting agency. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 CPD 278. However, and while we have recognized the necessity for contract modifications in general, see 50 Comp. Gen. 540 (1971), we also have consistently stated that the integrity of the competitive procurement system dictates that contracting parties may not employ changes in the terms of a contract that have the effect of circumventing the competitive procurement statutes. Die Mesh Corporation, B-190421, July 14, 1978, 78-2 CPD 36; E.R. Hitchcock & Associates, B-182650, March 5, 1975, 75-1 CPD 133.

While our observation in the A&J Manufacturing Company decision which Moore cites concerned a change in specifications, it was based on the view that to allow contracting personnel to make an award which they know or should know

is not based on the conditions under which performance will occur tends to undermine the integrity of the competitive bidding system. The potential injury in this respect is the same whether the harm complained of is due to a material change in specifications or to a material change in the conditions of performance known to the Government before the award, such as a substantial modification to the amount or nature of equipment which the Government will furnish during performance. The result is to deprive the Government of the full benefit of competition -- a lower price or better terms which it might otherwise have obtained.

Here, the record suggests that the contracting officer should have known before the award that a significant increase in the number of toters available for performance was likely shortly after performance was scheduled to begin.

The Army indicates that Fort Bliss facility engineers had wanted for some time to purchase mobile toters so that curbside collection could be implemented. By June of 1980, sufficient funds were available to purchase approximately 1,600 toters. The instant IFB, which as issued did not mention toters, was amended to indicate that 1,425 toters would be provided and bid opening was postponed to afford the bidders adequate chance to consider that factor in preparing their bids.

However, when the contracting officer attempted to purchase the toters under a Federal Supply Schedule contract, he found that the contract had expired. The purchase request was returned to the facility engineers to prepare specifications for a competitive procurement, and was resubmitted on August 1, two weeks before the Fowler award. The August 1 request stated that funds had become available for the purchase of approximately 4,000 units and sought procurement of the entire 3,582 totor lot. Thus, it appears that the Army's procurement office, which was handling both matters, should have known before Fowler was awarded the contract that the number of toters provided would be increased significantly.


Also, the record indicates the contracting officer actually was aware that the availability of toters, and presumably a change in the number of toters to be furnished, were material to calculating bid prices. As stated above, bid opening was postponed once earlier so that the IFB could be amended, principally to deal with curbside collection using 1,425 toters.

The Army believes that Moore was not prejudiced by the modifications because both offerors bid on the same basis (1,425 toters) and because Moore's evaluated curbside price (\$616,189.80) was approximately \$56,000 above Fowler's price for curbside service (\$560,952.00), i.e., that there was such a substantial difference in the firms' bids that Fowler probably would have won a competition under any circumstances. We do not find the Army's argument in this respect to be convincing.

Notwithstanding whether Moore would have received award, or whether Fowler would have bid a still lower price if the procurement had been reopened in view of the expected change in the conditions of performance, we are persuaded by Moore that the more toters available, the lower the contractor's labor costs. Since labor costs are a substantial factor in the cost of performing these services, a competition based on the imminent availability of 3,582 toters may have yielded a substantial reduction in the bid prices.

In the circumstances, we agree with Moore that award to Fowler was improper.

Accordingly, we believe that the Fowler contract renewal option should not be exercised. We recommend that the Army conduct a new procurement and award a new contract for the fiscal year 1982 requirement.



Acting Comptroller General
of the United States